IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE FOSTER	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
PATHMARK	**:**	
Defendant.	**:**	**NO. 99-3433**

Reed, S.J. **March 6, 2002**

MEMORANDUM

Plaintiff Lawrence Foster ("Foster") brought this suit against defendant Pathmark Stores, Inc. ("Pathmark") under the Americans with Disabilities Act of 1990 ("ADA"), 104 Stat. 328, 42 U.S.C. 12101, et seq. Presently before this Court is the motion of defendant for summary judgment (Document No. 34), pursuant to Federal Rule of Civil Procedure 56(c), and the response, reply, sur-reply, supplemental brief and additional response thereto. For the reasons which follow, I will grant the motion for summary judgment.

I. Background[1]

Foster is 37 years old and has a history of mental illness which began in 1982. He suffers from bi-polar disorder, severe manic episodes, mental disorder, delusions and anxiety, and a chemical imbalance. (Pl.'s Answers to Interrog. ¶ 5(a), Def.'s Ex. A.) In 1989, he began working at a Pathmark retail grocery store where he was a bagger. Foster worked for at least two different Pathmark stores. He worked four hours a day, four to five days a week and was paid $10.00 per hour. His employment was arranged through a social service agency.

[1] The facts laid out in this opinion are based on the evidence of record viewed in the light most favorable to the plaintiff Lawrence Foster, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

It seems that around the fall of 1995, Foster's mental health began deteriorating. Kim Eikerenkoetter ("Eikerenkoetter"), who seems to have been a supervisor of Foster, noticed that his appearance became "very poor," he had stains around his mouth, and his clothing was not fitting properly. (Eikerenkoetter Dep. at 2.) During the days leading up to December 21, 1995, Foster began feeling particularly unwell. (Foster Dep. at 45-47.) It seems he shared with the store manager, Donald Young ("Young"), that he was hearing voices and having delusions.[2] (Id. at 47.) On that day, Young told Foster to go outside and push grocery carts.[3] It was snowing. Foster resisted the request, and, according to Foster, Young told him, "do your job or quit," and Foster responded, "I quit." (Foster Dep. at 49.)

On that same day, Foster was hospitalized at the Eastern Pennsylvania Psychiatric Institute ("EPPI"), a public mental hospital, and then transferred to Friends Hospital, a private hospital in Northeast Philadelphia. He was discharged on January 2, 1996. Upon his release, Foster remained a patient of Dr. Neal Gansheroff ("Dr. Gansheroff"), a psychiatrist at Interact, a mental health organization, who had been his treating physician before that hospitalization, and continues to treat Foster today. (Dr. Gansheroff Supp. Medical Report of Dec. 14, 2001, Pl.'s Ex. A.)

On January 17, 1996, Mr. Leslie Farrell ("Farrell"), Foster's Interact caseworker, contacted Pathmark about Foster returning to work. (Farrell's Work Notes, Pl.'s Ex. G.) It

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[2] It should be noted that Foster later testified at his deposition that he did not share this information with Young. (Id. at 107.) Foster did more clearly testify, however, that everyone in the store knew he was on medication, and that at times Young would ask him if he had taken his medication. (Id.)

[3] Foster claims in his brief that he reported to work with no socks on his feet; however, no record citation for this fact is given.

seems a series of phone conversations and one meeting took place. On June 21, 1996, Foster, Farrell, and Pathmark officials met. The record of this meeting is somewhat unclear. The idea of having a job coach for Foster was discussed. Both Farrell and Michael Chironno ("Chironno"), a Pathmark official, testified at their respective depositions that it was he who suggested that Foster use a job coach. (Farrell Dep. at 125-26, 142; Chironno Dep. at 26, 45, 47.) Regardless of who came up with the idea, Pathmark seemed at least open to the possibility. Farrell was unsuccessful in his attempt to obtain the job coach. (Id. at 133, 142.) On November 5, 1996, Farrell received a message that Foster's job had been filled due to the length of time it had taken to obtain a job coach; thus Foster could not work at Pathmark. (Farrell's Work Notes, Pl.'s Ex. G.)

On July 11, 1997, Foster applied for benefits from the Social Security Administration. (Notice of Award, Def.'s Ex. D.) On October 26, 1997, Foster was informed that he met the requirements to receive disability benefits.[4] (Id.) The Social Security Administration ("SSA") found that under its rules, Foster became disabled on January 1, 1996, and could therefore receive benefits retroactive from 12 months before he filed for benefits. (Id.) Accordingly, he was awarded benefits from July 11, 1996.

On June 17, 1997, through the assistance of Community Legal Services ("CLS"), Foster attempted to file a claim with the EEOC. Apparently, certain information was missing, and the EEOC sent a letter with a new (presumably blank) charge to an attorney at CLS for completion. The EEOC also provided in the letter that if Foster wanted to cross file with the Pennsylvania

[4] At some point before October 26, 1997, he was informed that he met the requirements to receive medical benefits. (Id.)

Human Relations Commission ("PHRC"), the appropriate form needed to be filled out. The EEOC charge was perfected on November 5, 1997. It was not forwarded to the PHRC because that form was not filled out by Foster. On April 8, 1999, Foster received his right-to-sue letter. On July 7, 1999, he filed this action.

II. Standard

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the "test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Furthermore, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 250.

On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 176 (1962)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, and must produce more than a "mere scintilla" of evidence to demonstrate a genuine issue of material fact and avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Analysis

A. Timeliness

Pathmark's first argument is that Foster's EEOC filing is defective because he did not first file with the PHRC, and therefore, his ADA claim must fail. Defendant contends that this rule of law flows from Mohasco v. Corporation, 447 U.S. 807, 100 S. Ct. 2486, 65 L. Ed. 2d 532 (1980), and E.E.O.C. v. Commercial Office Products Company, 486 U.S. 107, 108 S.Ct. 1666, 100 L. Ed. 2d 96 (1988).

The Mohasco decision focused on the interpretation of 42 U.S.C. § 2000e-5(c) and (e). The former subsection provides in relevant part: ". . . no charge may be filed under subsection (a) . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . ." The latter subsection provides in relevant part: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice. . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred." The court held that the policies inherent in the statute demanded a literal reading of the two subsections. See Mohasco, 447 U.S. at 810, 100 S. Ct. at 2489. Thus, the EEOC generally cannot consider a charge filed until 60 days have elapsed or the state agency terminates its proceeding.

In Commercial Office Products, the Supreme Court first held that when a state agency waives the 60 day referral period under a worksharing agreement with the EEOC, the state is deemed to have "terminated" its proceeding, and the EEOC may immediately begin processing

the claim. See Commercial Office Products, 486 U.S. at 112, 108 S.Ct. at 1669. The court then held that an untimely filing under state law does not prevent the application of the extended 300 day federal filing period. See id. at 123-25, 108 S.Ct. at 1675-76. Thus, neither case specifically holds that an aggrieved person cannot file with the EEOC *unless* a claim has first been filed with the state agency.

In order to establish the appropriate limitations period here, it must first be noted that Pennsylvania is clearly a "deferral state," meaning the Commonwealth has a state or local law establishing or authorizing the state or local authority to grant or seek relief. See, e.g., Watson v. Eastman Kodak Co., 235 F.3d 851, 854 (3d Cir. 2000). In addition, a worksharing agreement exists in which each agency waives its right to initially review claims first filed with the other agency, and accordingly, the agreement in effect "terminates" PHRC proceedings initiated with the EEOC. See Woodson v. Scott Paper Co., 109 F.3d 913, 925-26 (3d Cir. 1997). The Court in Commercial Office Products also noted that the EEOC has interpreted the extended 300 day filing period to apply regardless of whether a state filing was pursued. Commercial Office Products, 486 U.S. at 124, 108 S.Ct. at 1676 (citing 52 Fed.Reg. 10224 (1987)). The courts within this Circuit have thus concluded that under the worksharing agreement the extended filing period is available even if no state filing occurred. See Gaspar v. Merck and Co., Inc., 118 F. Supp. 2d 552, 556 n.1 (E.D. Pa. 2000); Dubose v. District 1199C, Nat'l Union of Hosp. and Health Care Employees, AFSCME, AFL-CIO, 105 F. Supp. 2d 403, 411-12 (E.D. Pa. 2000) (collecting cases); Benn v. First Judicial Dist. of Pa., No. 98-5730, 2000 WL 1236201, at *1-2 (E.D. Pa. Apr. 26, 2000); Cardoza v. Merion Cricket Club, Civ. A. No. 95-4055 (JBS), 1996 WL 653397, at *6-7 (E.D. Pa. May 2, 1996) (citing Brennan v. Nat'l Tel. Directory Corp., 881 F.

Supp. 986, 993 (E.D. Pa. 1995)). I see no reason to disagree with this sound rule of law.

In the case before me, November 5, 1996 marks the date that defendant told Farrell that there was no job for Foster at Pathmark. On June 17, 1997, which falls within 300 days from November 5, 1996, Foster filed the "unperfected" charge with the EEOC. The claim was not "perfected" until November 5, 1997, which falls outside the 300 day limitation period. Defendant does not contend that the because the charge was not "perfected" until after the 300 day limitations period, Foster's filing should be deemed untimely. See New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124-25 (3d Cir. 1997) (laying out general standard for equitable tolling). I therefore conclude that Foster's claim is not barred for failure to comply with the applicable statutory period or for failure to exhaust on the ground that he failed to file a charge with the state agency.

B. Reconciling Position Before the SSA with Position Before this Court

Pathmark's second argument is that Foster is totally disabled and unemployable, and he cannot reconcile the position he took before the SSA where he won benefits on that basis with the position he now takes in his ADA claim that he can work with accommodations. Specifically, Pathmark relies on the fact that in Foster's application for disability benefits his treating physician, Dr. Gansheroff, checked a box which reads: "**PERMANENTLY DISABLED** - Has a physical or mental condition which **permanently** precludes any gainful employment. The patient is a candidate for Social Security Disability or SSI." (Def.'s Ex. C) (emphasis in original). Dr. Gansheroff did not check a box on the same form which provided: "**EMPLOYABLE** - The patient's physical and/or mental status is such that he or she can work." (Id.) (emphasis in original).

The Supreme Court has addressed this very issue in Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999), where it held that there is no *per se* rule that a claim for SSDI benefits inherently conflicts with a claim under the ADA, and courts should not apply any "special negative presumption" against such a plaintiff. See id., 526 U.S. at 802, 119 S. Ct. at 1602. In so holding, the Court highlighted a substantial difference between the two statutes: while under the ADA, a qualified individual includes a disabled person who is able to perform the essential functions of his job with "reasonable accommodations," the SSA does not consider the possibility of such an accommodation. See id. at 801-03, 119 S. Ct. at 1601-02. "The result is that an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it." Id. at 803, 119 S. Ct. at 1602 (emphasis in original). The court further observed that the SSA determines benefits pursuant to a five-step procedure which embodies a set of presumptions about disabilities, job availability, and their interrelation, the application of which means that an individual may qualify for benefits and yet, under the ADA, due to special circumstances, remain able to perform the "essential functions" of her job. See id. at 804-05, 119 S. Ct. at 1602-03.

The court developed the following standard with respect to what a plaintiff must prove to survive summary judgment:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

Id. at 807, 119 S. Ct. at 1604.

The Court of Appeals for the Third Circuit interpreted Cleveland in Motley v. New Jersey State Police, 196 F.3d 160 (3d Cir. 1999). In discussing the key difference between the two statutes, namely that one takes into account the effect of a reasonable accommodation, the Court of Appeals observed the following:

> Obviously, this is true in all of these cases and, if this argument alone allowed ADA plaintiffs who had previously applied for SSDI-type benefits to survive summary judgment, summary judgment could never be granted. *Because the Supreme Court indicated that summary judgment would indeed be appropriate in some cases, an ADA plaintiff must, in certain circumstances, provide some additional rationale to explain the plaintiff's apparent about- face concerning the extent of the injuries*. Considering the different contexts in which the two statutory regimes operate could, of course, be crucial to understanding how an ADA plaintiff's particular claims may be reconciled. The additional justification presented by the plaintiff could, in theory, go into detail regarding the facts of his or her case, demonstrating how the differing statutory contexts makes their statements made under one scheme reconcilable with their claims under the other.

Id. at 165 (emphasis added). Thus, the court seemed to indicate that in some situations, the plaintiff must provide a rational beyond the fact that the statutes operate under different schemes. Later in the opinion, the court noted that under Cleveland, "simply averring that the statutory schemes differ is not enough to survive summary judgment . . . . An ADA plaintiff *must* offer a more substantial explanation to explain the divergent positions taken." Id. at 166 (emphasis added).

In Motley, the plaintiff was a former state trooper who was injured on the job and eventually applied for an accidental disability pension, which under New Jersey law allows a State Police officer benefits if a medical board determines that the officer is "'permanently and totally disabled . . . and . . . physically incapacitated for the performance of his usual duties'" as a

result of an event that occurred as a consequence of the officer's duties. Id. at 163. In his disability pension claim, the Motley plaintiff offered very specific descriptions of his injuries and how they affected his ability to work; for instance, he stated that he had "extremely painful and recurring headaches" and "intense back pain" when he sat for over 20 minutes. See id. The plaintiff was awarded benefits, and the court concluded that the board presumably considered whether a reasonable accommodation would permit him to perform as a state trooper. See id. Thus, the Motley court was presented with a situation where both fora considered reasonable accommodations. The court determined that the plaintiff proffered no reasonable explanation for the apparent discrepancy and was therefore unable to reconcile the detailed statements made in order to receive benefits with his claim under the ADA. See id. at 167.

Here, the record before the Court includes three writings from plaintiff's treating psychiatrist, Dr. Gansheroff. The first, discussed *supra*, is the form he filled out for the SSA in support of Foster's application for disability benefits. The second report is a letter, dated September 7, 2001 from Dr. Gansheroff to George Wood, Foster's attorney, and provides in relevant part: "I see no psychiatric reason that he [Foster] couldn't work as a bagger and return carts from the parking lot. No special accommodations would be needed for that. . . . I feel he can again do that type of work, but he should only work during the day shift." (Def.'s Ex. E.) Pathmark argues that this letter precludes Foster from being able to reconcile the statement made to the SSA that he was permanently disabled and precluded from gainful employment with the statements made in this claim that a reasonable accommodation would allow him to work. Pathmark focuses on that portion of the letter where Dr. Gansheroff states that "No special accommodations would be needed [for Foster to work as a bagger.]" Thus defendant takes the

position that Foster has admitted that no accommodation would help him.

Foster counters that the letter acknowledges that Foster needs the accommodation of day-time working hours. See Failla v. City of Passaic, 146 F.3d 149, 154 (3d Cir. 1998) (transfer to day shift deemed a reasonable accommodation). Foster also includes in his response a "Supplemental Medical Report," dated December 14, 2001, in which Dr. Gansheroff provides in relevant part that:

> From that time [December, 1995] to the present I saw no psychiatric reason why Lawrence [Foster] could not have returned to work as a bagger, returning carts to and from the parking lot and performing other similar routine tasks on a part-time basis. . . . *The accommodation of daytime hours is necessary due to the effects of his medication during the night*. . . . When I completed the medical report at the time Lawrence applied for Social Security Disability (SSDI), the application did not take into consideration a reasonable accommodation which if given to Lawrence would not only allow him to work part-time, but may very well allow him to develop with training into working full-time.

(Pl.'s Ex. A) (emphasis added). Foster also includes in his response a statement signed by him that reads in relevant part:

> At the time my application was presented to the Social Security Administration for Social Security Disability Insurance (SSDI), I was not given an opportunity to express or explain why I was disabled for purposes of Social Security benefits or that *I could have been employed had I been given the opportunity to perform my old job of customer service representative had I been given the accommodation of working part-time and working day shift hours, which is what I was doing in the first place.*

(Pl.'s Ex. C) (emphasis added).

The three documents signed by Dr. Gansheroff and the statement of plaintiff are to be

viewed in the light most favorable to Foster as the nonmoving party.[5] I will therefore assume for these purposes that the fact that Dr. Gansheroff wrote that Foster requires "no special accommodation," does not preclude Foster from using the "reasonable accommodation" explanation to harmonize the apparent inconsistency inherent in this type of case. I will further assume that plaintiff's statement recited above does not contradict with anything else in the record before this Court. This means that Foster takes the position that being given day time and part-time work is the reasonable accommodation that was not considered by the SSA and should serve as his reasonable explanation to harmonize the seemingly different positions taken by plaintiff before the SSA as compared to before this Court in pursuing a claim under the ADA.

Pathmark hones in on the obvious problem with Foster's position. A disability, for the purpose of receiving social security benefits, is defined as "a severe impairment, which makes you *unable to do your previous work* or any other substantial gainful activity which exists in the national economy." 20 C.F.R. § 404.1505(a) (emphasis added). Thus, when Foster applied for benefits, he claimed, and the SSA found, that he was unable to function in his previous work as it existed. However, when he was employed at Pathmark, Foster already had the "accommodation" of day time and part-time work; the record indicates that he worked four-five days a week for four hours at a time, (Foster Dep. at 31-36), and there is no indication that these hours were performed during nighttime hours. Foster is not contending that a *new* and "reasonable

[5] I observe that the latter two reports of record by Dr. Gansheroff were generated at the request of plaintiff's counsel in the midst of contentious litigation. None of the three doctor reports detailed above are in the form of sworn affidavits. The first two, namely, the form submitted to the SSA and the report dated September 7, 2001, are being offered by the defendant as an admission. The latter report is being offered by plaintiff, and thus, technically it is improper for the Court to rely upon it under Federal Rule of Civil Procedure 56(e). Because there is no prejudice to defendant, the party intended to be protected by the rule, I have considered all three reports.

accommodation" would make him able to be a bagger or that he could perform a different job at Pathmark. See Mayo v. Consolidated Rail Corp., No. 98-656, 1999 WL 33117176, at *3 (E.D. Pa. June 23, 1999) (concluding that after an SSA award, a change to "light duty status" allowing plaintiff to do his job meets standard in Cleveland); Donahue v.Consolidated Rail Corp., 52 F. Supp. 2d 476, 480 (E.D. Pa. 1999), aff'd, 224 F.3d 226 (3d Cir. 2000) (concluding that statements were consistent because disability application only stated that could not work as "engineer" not that could not have done a different job other than conductor).

This situation is similar to the one presented in Motley. There, as discussed above, the Court of Appeals presumed that the pension board had considered whether a reasonable accommodation would allow the plaintiff to function in his former job. See Motley, 196 F.3d at 163. Accordingly, in Motley, in addition to the ADA scheme accounting for reasonable accommodations, the Court inferred that the group which awarded benefits had considered such accommodations in determining whether the plaintiff was eligible for benefits. Here, the same assumption can be made. In deciding whether Foster was eligible for social security benefits, the SSA had to have taken into account the nature of plaintiff's employment with Pathmark, including the reasonable accommodation of part-time and day time work since that is the work schedule Foster operated under when he was previously employed by Pathmark. The SSA still granted benefits to Foster on the legal basis, as it must, that Foster was not able to perform the duties of his old job. In summary, the reasonable accommodation proffered by Foster cannot serve to reconcile the position he took before the SSA (that he was permanently disabled and unemployable) with the position he now takes under the ADA (that he is employable with such reasonable accommodation) because the accommodation was always a part of his job at

Pathmark. This Court takes judicial note that these types of modest accommodations are a part of a majority of jobs in the national economy; in this sense, in the case before me, part-time and daytime work is not a genuine accommodation. I must therefore conclude that Foster has failed to proffer an explanation sufficient to allow a reasonable juror to conclude that despite the statement presented to the SSA, Foster could "perform the essential functions" of his job with or without a reasonable accommodation as required by Cleveland, 526 U.S. at 807, 119 S. Ct. at 1604.

IV. Conclusion

This Court is well aware that it is not permitted to weigh evidence, including the credibility of statements made by plaintiff, in deciding a motion for summary judgment; accordingly, I have viewed all evidence of record in the light most favorable to plaintiff. This Court also appreciates the frustration that plaintiff inevitably has with the fact that he feels Pathmark discriminated against him on the basis of his disability. However, when plaintiff applied for, and has since received, benefits, he and his treating psychiatrist stated in that application that his disability prevented him from performing his previous work, which included a day time and part-time schedule. Plaintiff did not present any other argument for reconciling the position he took before the SSA with the position he takes before this Court. As such, defendant has demonstrated that it is entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56(c).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE FOSTER	**:**	**CIVIL ACTION**
	:	
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
PATHMARK	**:**	
	:	
Defendant.	**:**	**NO. 99-3433**

ORDER

AND NOW, this 6th day of March, 2002, upon consideration of the motion of defendant Pathmark Stores, Inc. for summary judgment (Document No. 34), pursuant to Rule 56 of the Federal Rules of Civil Procedure, as well as the response, reply, sur-reply, supplemental brief and additional response thereto, and considering the pleadings, discovery, admissions and affidavits of record, and having concluded for the reasons set forth in the foregoing memorandum that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, it is hereby **ORDERED** that the motion is **GRANTED**.

JUDGMENT is hereby **ENTERED** in favor of Pathmark Stores, Inc., and against Lawrence Foster.

This is a final order.

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LOWELL A. REED, JR., S.J.